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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-202434

DATE: January 7, 1982

MATTER OF: X-Tyal International Corporation

DIGEST:

1. Where a bidder alleges that timely receipt of its telegraphic bid modification at the installation was prevented by a defect in the installation's telex procedures, but the record contains insufficient evidence that nonreceipt could have been due to an alleged defect, or that a defect in fact existed, there is no basis for considering the modification under the IFB's "Late Bids and Modifications or Withdrawals" clause.
2. Inability of an installation's telex machine to automatically acknowledge receipt of a bid modification does not constitute Government mishandling in the process of receipt since this inability in no way prevents receipt or interferes with the mechanics of the receipt process.
3. Responsibility for assuring that bids or modifications are timely received at the appropriate bid opening office rests solely with the bidder, and the inability of an installation's telex machine to automatically acknowledge receipt of a telegraphed bid modification does not warrant shifting this burden to the Government.

X-Tyal International Corporation protests the award of a contract to any other firm under invitation for bids (IFB) No. N00104-81-B-0335, issued December 22, 1980 by the Department of the Navy's Ships Parts Control Center (SPCC)

in Mechanicsburg, Pennsylvania. The solicitation, a total small business set-aside, sought bids to supply a quantity of inflatable lifeboat cases. X-Tyal contends it was the low bidder by virtue of a telegraphic bid modification sent to SPCC via Western Union on January 20, the day before bid opening. The Navy claims it never received a modification of X-Tyal's bid. For the reasons stated below, we deny the protest.

Rubbercrafters of West Virginia was the apparent low bidder at \$257.73 per unit; X-Tyal bid \$500.00 per unit. On January 28, 1981, one week after bid opening, X-Tyal informed the Navy it had reduced its bid to \$244.00 by telegraphic message sent the day before bid opening, and later furnished the Navy a copy of its message plus Western Union's confirmation copy as proof of this claim. The Western Union copy indicated that the message had been transmitted to the SPCC telex machine at approximately 4:13 p.m. on January 20. There was no evidence that receipt of the message was ever acknowledged by SPCC, however, and since several investigations uncovered no other evidence that the message actually had been received, the Navy determined that the late modification could not be accepted under the "Late Bids and Modifications or Withdrawal" clause in the IFB. It thus concluded that X-Tyal's unmodified bid of \$500 per unit was properly considered.

While X-Tyal seems to concede that the documents it has furnished do not show actual receipt of the modification by SPCC, it submits that the answer back code "SPCCMEC C MECH" appearing on Western Union's copy of the message should be deemed sufficient to establish receipt.¹ X-Tyal argues that since the Navy

¹ This answer back code is received in response to a preliminary signal sent by Western Union when transmitting to a machine without an automatic acknowledgment code. Its appearance on the message shows that the line to the SPCC telex was open and the telex ready to receive immediately prior to transmission of the actual message. While this technique apparently reduces substantially the possibility of nonreceipt due to a busy machine, it is not equivalent to an acknowledgment code, which shows not merely that the machine was ready, but that the message was actually received by the machine.

failed to equip the SPCC telex with an automatic acknowledgment code device, the answer back code is the best available evidence of receipt. It cites our decisions in Hydro Fitting Mfg. Corporation, 54 Comp. Gen. 999 (1975), 75-1 CPD 331 and Lockley Manufacturing Co., Inc., B-195589, January 4, 1980, 80-1 CPD 15 as authorizing proof of receipt in this manner where the evidence relied upon is beyond the bidder's control, and no better evidence of receipt is available due to Government mishandling during receipt of the message. X-Tyal maintains that the Western Union copy of its message showing the answer back legend was beyond its control and that the inability of the SPCC telex to automatically acknowledge receipt of messages was a "major defect in the SPCC telex machine procedures" which constituted Government mishandling of its modification. X-Tyal believes it is thus entitled to the award as the low responsive, responsible bidder.

Under the "Late Bids and Modifications or Withdrawals" clause incorporated in the solicitation, a telegraphic bid modification not received at the designated office prior to bid opening can be considered only if it is received prior to award and the Government determines that late receipt was due solely to Government mishandling after receipt at the Government installation. See Defense Acquisition Regulation (DAR) § 7-2002.2. Ordinarily, the time of receipt at the installation must be established before we will consider the question of Government mishandling. The only acceptable evidence of receipt at the Government installation, under DAR § 7-2002.2, is the time/date stamp or other documentary evidence maintained by the installation. Lockley Manufacturing Co., Inc., *supra*; Lambert Construction Company, B-181794, August 29, 1974, 74-2 CPD 131.

As X-Tyal observes, our decisions in Hydro Fitting Mfg. Corp., *supra*, and Lockley Manufacturing Co., Inc., *supra*, recognize that the evidentiary restrictions in the late bid modification clause will not be strictly adhered to where it is alleged that Government mishandling in the process of receipt was the paramount cause for late receipt or non-receipt at the installation. Under such circumstances,

timely receipt may be established by reference to other reliable evidence not under the bidder's control. In Hydro, we held that a telex machine malfunction which prevented transcription of a telegraphic bid constituted mishandling by the Government. In so holding, we recognized that because the message was never transcribed, the installation could possess none of the evidence of timely receipt (e.g., a time/date stamp on a message document) required by the solicitation. Reasoning that this situation was not contemplated under DAR § 7-2002.2, we referred to other reliable evidence of receipt: an acknowledgment code from the malfunctioning telex which appeared on the bidder's copy of the message, and the fact that the confirmation copy of the bid was mailed to the installation before the bidder could possibly have been aware of the malfunction. In addition, the agency conceded it had no doubt that the message had been received by the machine even though it was never transcribed. Based on these factors we concluded that, had the machine been properly maintained by the agency, the message would have been received prior to bid opening.

Our approach in Lockley was similar. There, a bid sent by certified mail was delivered at the Government installation (which was also the bid opening room) prior to bid opening but the bid opening official inadvertently failed to open the envelope and stamp the bid until after bid opening. Since the issue was whether the bid was received late in the designated office, we found the evidentiary restrictions on proof of receipt inapplicable and referred to other reliable evidence of timely receipt: a sworn statement by the bid opening official. We found this statement sufficient to show that the bid had been received prior to bid opening even though the time/date stamp showed receipt after bid opening.

If we were to agree that X-Tyal's bid modification was not received at SPCC due to a defect in SPCC's telex receiving procedures, and that, as in Hydro and Lockley, the evidentiary restrictions in the late bid modification clause should not apply, this would not help X-Tyal. The only evidence submitted by X-Tyal is the Western Union copy of its modification message. As discussed above, the "SPCCMEC C MECH" legend shows only that the line to the SPCC telex was open immediately prior to transmission. Similarly, the time printed on the message establishes only that the message was transmitted at 4:13 p.m. the day before bid opening, not that it

was ever received. Since none of this evidence shows that Western Union ever made a connection with the SPCC telex, we have no basis for finding that X-Tyal's message would have been timely received but for an alleged defect in SPCC's telex procedures.

In any event, we do not believe that X-Tyal established that there was a defect in SPCC's telex procedures. Although the SPCC telex machine is not capable of automatically acknowledging receipt, X-Tyal does not explain how this so-called "defect" affected the receipt of its modification. Indeed, since an acknowledgment code merely evidences receipt and is not involved in the actual mechanics of the receipt process, we do not see how the absence of the code could possibly have prevented or even interfered with the receipt of X-Tyal's message. See Record Electric, Inc., 56 Comp. Gen. 4 (1976), 76-2 CPD 315; S&Q Corporation, B-186794, November 11, 1976, 76-2 CPD 402. The mere fact that the absence of the code may have deprived X-Tyal of documentary evidence of receipt certainly does not mean SPCC's telex procedures were defective; there is no requirement that agencies equip their telex machines with automatic acknowledgment devices to supply bidders with evidence of receipt.

X-Tyal further suggests that since the Navy has failed to equip SPCC's telex with an automatic acknowledgment code, the Navy, not the bidders, must accept the risk that modifications may not be received when sent to the machine while unmanned. This argument is without merit. Our Office has consistently held that a bidder has the responsibility to assure timely arrival of its bid for a scheduled bid opening and must bear responsibility for the late arrival of a bid or modification. B.E. Wilson Contracting Corp., 55 Comp. Gen. 220 (1975), 75-2 CPD 145. We think SPCC's practice of setting its telex machine for automatic receipt after 3:00 p.m. reasonably assured the receipt of telegraphic bid modifications, and we thus do not think that the absence of an automatic acknowledgment code warrants shifting the bidder's responsibility to the Government.

B-202434

6

The protest is denied.

Harry R. Van Cleave
For the Comptroller General
of the United States